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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1479

MATSUSHITA ELECTRIC INDUSTRIAL COMPANY, LTD. and MATSUSHITA ELECTRIC CORPORATION OF AMERICA,

Petitioners,

—v.—

THE UNITED STATES TREASURY DEPARTMENT, THE BUREAU OF CUSTOMS, THE UNITED STATES TARIFF COMMISSION, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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—v.—

THE UNITED STATES TREASURY DEPARTMENT, THE BUREAU OF CUSTOMS, THE UNITED STATES TARIFF COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioners, Matsushita Electric Industrial Co., Ltd. and Matsushita Electric Corporation of America, petition for a writ of certiorari to review the judgment of the United States Court of Customs and Patent Appeals rendered herein on February 1, 1973.

Opinions Below

The opinion of the United States Court of Customs and Patent Appeals, which is reported in the Customs Bulletin, Vol. 7, No. 8, p. 29 (Feb. 21, 1973) appears as Appendix A to this Petition. The opinion of the United States Customs Court, reported at 67 Cust. Ct. 328, appears as Appendix B.

Jurisdiction

The Judgment of the Court of Customs and Patent Appeals for which review is sought was entered on February 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1256.

Question Presented

Does the United States Customs Court have the power under the All Writs Act, 28 U.S.C. §1651, to intervene and prevent immediate irreparable injury, and continuation of governmental conduct which is in deprivation of fundamental constitutional rights, in proceedings under the Antidumping Act of 1921, 19 U.S.C. §160 *et seq.*, where the requirements for Customs Court jurisdiction under 28 U.S.C. §1582 have not yet been met?

Constitutional and Statutory Provisions Involved

The Federal constitutional provision involved is the Due Process Clause of the Fifth Amendment of the Constitution of the United States, which is set forth in Appendix C.

The following statutes, which are set forth in Appendix D, are also involved: 19 U.S.C. §160 *et seq.* (the Antidumping Act of 1921); 28 U.S.C. §1651 (the All Writs Act); 5 U.S.C. §551 *et seq.* (The Administrative Procedure Act); 28 U.S.C. §1582 (Jurisdiction of the Customs Court); 19 U.S.C. §1514 (Protest against decision of appropriate customs officer).

Statement of the Case

This case presents an important question of first impression regarding the power of the Customs Court to protect against governmental conduct in deprivation of fundamental constitutional rights in proceedings conducted pursuant to the Antidumping Act of 1921 (19 U.S.C. §160 *et seq.*). If the decision below is allowed to stand, persons being irreparably injured as a result of unconstitutional and unlawful administrative conduct will have no place to go for relief in such extraordinary circumstances—until it is too late. Moreover, public confidence in the administrative process will suffer immeasurably, particularly in connection with the rapidly increasing number of proceedings affecting international trade which are being conducted by respondents under the Antidumping Act of 1921. The circumstances under which this case arose are briefly set forth below.

Petitioner Matsushita Electric Industrial Co., Ltd. (hereinafter "MEI") is a Japanese corporation which, among other things, manufactures television sets in Japan for sale in Japan and for export to the United States and other countries. Petitioner Matsushita Electric Corporation of America (hereinafter "MECA") is a United States corporation which, among other things, imports and sells in the United States television sets manufactured by MEI. Since 1968 petitioners have been the subject, along with other Japanese television manufacturers and United States importers of televisions from Japan, of a proceeding conducted by respondents Treasury Department (including the Bureau of Customs) and Tariff Commission under the Antidumping Act of 1921 involving monochrome and color television receivers from Japan (ATS:643.3; AA 1921-66).

Under the Antidumping Act, if the Treasury Department determines that merchandise imported into the United States is being, or is likely to be, sold in the United States at a price which is less than "fair value" (hereinafter "LTFV" determination), and if the Tariff Commission then determines that a United States industry is being, or is likely to be, injured by reason of such imports, a dumping finding is issued. Thereafter, a special dumping duty will be imposed, equal to the difference between the lower price for sale in or to the United States (designated as "exporter's sales price" or "purchase price" in the Antidumping Act) and the price of such or similar merchandise sold in the country of exportation (designated as "foreign market value" in the Antidumping Act), on all imports from the date the Treasury Department withheld appraisement on imports of the merchandise involved.*

On December 4, 1970, after a two year review of statistical, accounting, marketing and other factual information submitted by petitioners and certain other exporters and importers relating to the prices, production costs and selling methods and expenses of the televisions they sold in Japan and the United States, the Treasury Department issued its LTFV determination regarding all television receivers from Japan. On March 4, 1971, the Tariff Commission made an affirmative injury determination, thus

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* When the Treasury Department has information which indicates a probable LTFV determination, it publishes a Withholding of Appraisement Notice in the *Federal Register*. From that day forward, appraisement on all imports of the merchandise involved is suspended, and the importer must post a bond to cover anticipated possible dumping duties. If a dumping finding is ultimately made, all imports from the date of the withholding are subject to imposition of possible dumping duties. In the instant case, withholding of appraisement took place on September 4, 1970.

enabling a dumping finding to be made and published on March 9, 1971.*

Petitioners were deeply concerned about the dumping finding, since they not only believed it to be inaccurate, at least as to themselves, but in any event to be based upon unconstitutional and unlawful proceedings conducted by respondents. In addition, the dumping finding created serious uncertainty regarding the level of ultimate duties on petitioners' imports, which injected an artificial but effective barrier to the free flow of commerce in petitioners' television sets sold in Japan and the United States, all to petitioners' irreparable injury.

Moreover, petitioners were concerned about an anticipated lengthy delay before the Customs Bureau would determine whether any actual dumping duties would be imposed on petitioners' televisions imported since the withholding of appraisement. Petitioners could not obtain Court review under 28 U.S.C. §1582 of the validity of respondents' conduct until that time. It is now *over two years since the dumping finding* and the Bureau has *just begun* to appraise the television imports of petitioners for purposes of determining if actual dumping duties are warranted on petitioners' imports during the period covering only September 4, 1970 through March 31, 1971. Information covering subsequent periods has only recently been requested from petitioners by the Bureau.

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* Since that time, the Treasury Department has been reviewing new information covering subsequent time periods supplied by Japanese exporters and U.S. importers, including petitioners, to determine whether special dumping duties on imports since the withholding of appraisement are warranted on individual shipments under the Antidumping Act.

In order to avoid this anticipated delay for their day in court, with the attendant business uncertainties resulting therefrom, on July 1, 1971, petitioners filed a summons and petition with the United States Customs Court in an effort to obtain mandatory, injunctive and other relief against further irreparable injury resulting from the unconstitutional, illegal and arbitrary administrative conduct to which petitioners were subjected in the aforementioned antidumping proceeding. The Customs Court's power under the All Writs Act (28 U.S.C. §1651) was explicitly invoked as the basis for its considering the merits of the petition, since no dumping duties had yet been levied or a protest filed and denied, and the Customs Court's jurisdiction under 28 U.S.C. §1582 was not, therefore, available.

In its petition, petitioners challenged the validity of the dumping proceeding and finding as conducted by respondents for, among others, the following reasons:

1. The entire proceeding, which involved intricate factual determinations, was conducted without a hearing on the record in deprivation of petitioners' rights under the Due Process Clause of the Fifth Amendment to the Constitution and the Administrative Procedure Act (5 U.S.C. §551 *et seq.*);

2. In the course of the proceedings, the respondents used and relied upon factual information which was undisclosed to petitioners and thus not subject to any challenge which would insure its accuracy, in deprivation of petitioners' right to a fair adjudication of the issues and the right to cross-examine and challenge evidence used against petitioners;

3. The Treasury Department made its determinations without revealing adequately either the facts or the reasons upon which they were made;

4. Prior to their LTFV determination, Treasury Department officials made public statements which were subsequently reported and widely disseminated in newspapers and other media, indicating actual or apparent prejudgment of the issues being decided, in deprivation of petitioners' right to a fair and impartial determination based upon the record and free from the taint of adverse pretrial publicity and prejudice; and

5. Treasury Department officials unfairly and arbitrarily misconstrued and misapplied the applicable statutory criteria for determining sales at less than fair value, thereby arriving at an erroneous determination under the statute.

Under these circumstances, petitioners sought under the All Writs Act: either (a) an order vacating all determinations and findings in the aforementioned antidumping proceeding, dismissing the proceeding and enjoining defendants from taking any further action in connection therewith, and declaring the invalidity and unconstitutional nature of the proceeding; or (b) an order declaring the invalidity and unconstitutional nature of the proceeding and vacating the dumping determination, and requiring respondents to conduct the proceeding in the manner required by law and the Constitution.

The Customs Court acknowledged its power to review the "legality of all orders and findings" relating to an administrative decision to assess dumping duties and to

"review the actions of the Secretary of the Treasury and the Tariff Commission to determine whether the procedures prescribed by Congress have been followed and whether the Secretary, the Tariff Commission, or their delegates have proceeded within the statutory authority or whether their actions are *ultra vires* and void" (App. B, p. 13a). Nevertheless, it concluded that it did not have the power to grant the relief requested under the All Writs Act, since it could not use the All Writs Act "to confer jurisdiction where Congress has not only not provided for it but has in effect denied it" (App. B, p. 18a).

The Court also ruled that it had no "appellate jurisdiction" over the Department's and Bureau's administrative actions, and it had no "supervisory powers over customs or treasury officials" (App. B, p. 16a).

On December 15, 1971, petitioners filed a Notice of Appeal and Assignment of Errors in the Court of Customs and Patent Appeals. Following the submission of briefs and oral argument, that Court affirmed the order of the Customs Court in a brief *Per Curiam* opinion, noting its agreement with the memorandum of the Customs Court (App. A). Judge Baldwin filed a concurring opinion stating further that the Customs Court could not issue a writ of mandamus under the All Writs Act, since "[a] proposal was made during the pendency of the Customs Court Act of 1970 that [mandamus] jurisdiction should be conferred on the Customs Court, but the proposed provision was never enacted" (App. A, p. 5a).

Reasons for Granting the Writ

This case presents an important question concerning the administration of the federal court system and the power of federal courts to control effectively the unconstitutional and unlawful action of federal administrative agencies. In particular, it involves the power of the Customs Court to intervene and protect against immediate irreparable injury resulting from the deprivation of petitioners' fundamental rights to due process of law in a proceeding under the Antidumping Act of 1921.

Normally, the Customs Court's jurisdiction to review a dumping proceeding is invoked after a protest filed against the assessment of dumping duties has been denied. 19 U.S.C. §169; 19 U.S.C. §1514; and 28 U.S.C. §1582. But in a case such as this, where unlawful and unconstitutional administrative conduct has caused immediate and irreparable injury to petitioners, and the filing of such a protest remains only a contingent future remedy, both essential fairness and the proper control of administrative action make it appropriate for the Customs Court to exercise its power under the All Writs Act to provide an immediate effective remedy.

The Court below denies the existence of this power. We believe that precedents in this Court and others mandate a contrary conclusion under the All Writs Act, and warrant the grant of the writ requested herein to correct this serious error.

There can be no doubt, as the Government conceded in its briefs below, that the All Writs Act applies to the Customs Court, since the Act applies by its own terms to "all

courts established by Act of Congress." * This conclusion is amply demonstrated in decisions sustaining the All Writs Act's applicability to other specialized courts. *See, e.g., Noyd* v. *Bond,* 395 U.S. 683 (1969) (holding the Act applicable to the Court of Military Appeals); *Loshbough* v. *Allen,* 56 CCPA 913, 404 F.2d 1400 (1969) (holding the Act applicable to the Court of Customs and Patent Appeals); and *Kamen Soap Products Co., Inc.* v. *United States,* 110 F. Supp. 430 (Court of Claims 1953) (holding the Act applicable to the Court of Claims).

Similarly, the decisions of this Court make it clear that under the All Writs Act *all* courts of the United States (which includes the Customs Court) have the power to issue writs in aid of their *potential* jurisdiction, whether or not the prerequisites for invoking such jurisdiction have yet been satisfied.

For example, in *Ex parte United States,* 287 U.S. 241 (1932), this Court exercised its power under the predecessor of the All Writs Act to review a decision of a District Court judge based upon its ultimate potential jurisdiction, in spite of the fact that the case could also have been appealed to a Circuit Court of Appeals. Per the Court:

> ". . . this court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals —this court having ultimate discretionary jurisdiction by certiorari. . . ." 287 U.S. at 248.**

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* *See* Brief for the Appellees in the Court of Customs and Patent Appeals at 15.

** The Customs Court's ultimate or potential jurisdiction on antidumping cases (*see infra,* p. 12) is, of course, closely akin to this

See also Ex parte Republic of Peru, 318 U.S. 578 (1943); Justice Harlan's concurring opinion in *Chandler* v. *Judicial Council,* 398 U.S. 74, *reh. denied,* 399 U.S. 937 (1970) ("... the Court may issue the writ when the lower court's action might defeat or frustrate the Court's *eventual* jurisdiction, even where the jurisdiction could be invoked on the merits only after proceedings in an intermediate court") (398 U.S. at 112).

This same principle similarly enables a U.S. court under the All Writs Act to grant injunctive relief affecting an administrative proceeding which is subject to a later review by that court, even at an interlocutory stage of the proceeding. Thus, in the landmark case of *FTC* v. *Dean Foods Co.,* 384 U.S. 597 (1966), this Court upheld the jurisdiction of a Court of Appeals under the All Writs Act to issue an injunction during the pendency of an administrative proceeding which at its conclusion might have been subject to judicial review by that Court. *See also, Eastern Greyhound Lines* v. *Fusco,* 310 F.2d 632 (6th Cir. 1962); *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 439 F.2d 584 (D.C. Cir. 1971). And the cases are legion in which a reviewing court has exercised its power under the All Writs Act to remedy fundamental constitutional infirmities or resolve novel and important questions even though its reviewing jurisdiction was potential only. *See, e.g., Ex parte Simons,* 247 U.S. 231 (1918); *Ex parte Peterson,* 253 U.S. 300 (1920); *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957).

Court's ultimate or potential certiorari jurisdiction, since unless it is invoked by a petitioner, this Court would never have power to exercise such jurisdiction. In other words, jurisdiction plainly exists, but remains unperfected and hence only potential until a petitioner seeks to have such jurisdiction invoked by the Court.

In the instant case, if the prerequisites of 28 U.S.C. §1582 had been satisfied, the Customs Court would clearly have had jurisdiction to review the issues raised by the petition below. *See, e.g., Kleberg & Co., Inc.* v. *United States,* 21 CCPA 110, T.D. 46446, 71 F.2d 332 (1933); *United States* v. *Elof Hanson, Inc.,* 48 CCPA 91, C.A.D. 771, 296 F.2d 779 (1960), *cert. denied,* 368 U.S. 899 (1961); *City Lumber Co., et al.* v. *United States,* 457 F.2d 991 (1972). Indeed, the Customs Court below specifically conceded its power to review the "legality of all orders and findings" relating to an administrative decision to assess dumping duties and to "review the actions of the Secretary of the Treasury and the Tariff Commission to determine whether the procedures prescribed by Congress have been followed and whether the Secretary, the Tariff Commission, or their delegates have proceeded within the statutory authority or whether their actions are *ultra vires* and void" (App. B, p. 13a).

It cannot be gainsaid, therefore, that the Customs Court has potential jurisdiction to consider this case. Accordingly, under the line of cases cited above, the power of the Customs Court to act now is manifest, since a court's jurisdiction under the All Writs Act "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 603-604 (1966), quoting *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943).

In short, under the long standing precedents of this Court and others, the Court below plainly erred in concluding that the Customs Court has no power to consider the merits of the petition and grant or deny the relief

requested by petitioners under the All Writs Act. Indeed, nothing relied upon by the Court below supports a contrary conclusion.

Thus, while it is true, as the Customs Court stated, that the All Writs Act "does not contain a new grant of judicial power" (App. B, p. 15a), as we have already shown, *the subject matter of this action is clearly within the potential jurisdiction of the Customs Court.* Hence, contrary to the decision below, exercise of its power under the All Writs Act would not enlarge the Customs Court's jurisdiction.*

Moreover, the Customs Court's claimed absence of "appellate jurisdiction" over the dumping finding is not only irrelevant, but is also erroneous. Thus, the All Writs Act extends power to *all* courts in aid of their respective jurisdiction without regard to whether the jurisdiction can be technically characterized as "appellate jurisdiction." *See, e.g., Chicago and North Western Ry. Co.* v. *United Transportation Union,* 422 F.2d 979 (7th Cir. 1970) (authorizing District Court to exercise power under the All Writs Act). In any event, the Customs Court's reviewing power over antidumping proceedings is plainly appellate in nature, or at least is so extensive that consideration of the issues raised by the petition below is within its potential jurisdiction, and conduct pursuant to the All Writs Act does not constitute the exercise of *new* jurisdiction by the Court (App. B, p. 13a).

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* The cases relied upon by the Court below all involved situations in which the All Writs Act was invoked in an attempt to enlarge the jurisdiction of a court beyond its potential jurisdiction. *See United States* v. *First Federal Savings and Loan Ass'n,* 248 F.2d 804 (7th Cir. 1957); *Benson* v. *State Board of Parole and Probation, et al.,* 384 F.2d 238 (9th Cir. 1967); *Longview Tugboat Co.* v. *Jameson,* 218 F.2d 547 (9th Cir. 1955); *Stafford* v. *Superior Court of California,* 272 F.2d 407 (9th Cir. 1959), all cited in App. B, p. 15a.

As for the conclusion that the Customs Court lacks so-called "supervisory powers" over Customs and Treasury officials, the Customs Court is a court of law and, as such, has an obligation to ensure that the constitutional and statutory requirements with respect to administrative procedure have been met. *See David H. Moss Co.* v. *United States,* 26 CCPA 381, C.A.D. 45, 103 F.2d 395 (1939); *Carl Zeiss, Inc.* v. *United States,* 23 CCPA 7, T.D. 47654, 76 F.2d 412 (1935). As stated in the *Moss* case:

> "There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not." 26 CCPA at 383.

In any event, "supervisory power" was never a prerequisite to this Court's exercise of jurisdiction under the predecessor of the All Writs Act (*Ex parte United States,* 287 U.S. 241 (1932)); and this Court's "supervisory power" was merged in 1948 with the predecessor of the All Writs statute into 28 U.S.C. §1651, which gives *all* federal courts identical powers to issue writs in aid of their actual or potential jurisdiction. Thus, either *all* courts presently exercise supervisory power by virtue of the All Writs Act or supervisory power is not a prerequisite for the exercise of All Writs Act jurisdiction by *any* court.* In short, the Court below erroneously relied on the ostensible absence of "supervisory powers" in reaching its conclusion.

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* It is not surprising, therefore, that in cases like *FTC* v. *Dean Foods Co.,* 384 U.S. 597 (1966), and *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957), "supervisory power" was never mentioned by this Court as a necessary prerequisite to jurisdiction under the All Writs Act.

The Court below likewise erred in concluding that the exercise of the Customs Court's power under the All Writs Act would not aid its jurisdiction. Any ultimate review by the Customs Court of respondents' conduct in the dumping proceeding, and the validity of the proceeding itself, will be totally frustrated if the Customs Court does not intervene now to correct the unlawful antidumping procedures which governed. For example, how, in the absence of a record, will the Customs Court be able to determine whether the administrative officials have misconstrued the language of the Antidumping Act or gone beyond the scope of their authority? Similarly, how can the Customs Court determine whether Treasury Department personnel have properly considered the evidence and determined the facts in the case? In other words, the Customs Court's potential jurisdiction to review the proceedings in the television antidumping case is nugatory unless the Customs Court intervenes now to insure that its review will be made on the basis of a record. Without such a record, meaningful judicial review is impossible.

As for Judge Baldwin's concurring opinion, it erroneously relies on proposals to give the Customs Court mandamus jurisdiction which were made by witnesses during Congressional consideration of the Customs Court Act of 1970. There is absolutely no evidence in the legislative history of that statute that Congress even considered these proposals. Indeed, Congressional inaction on the proposals is equally consistent with the view that Congress found the proposals to be unnecessary because of the Customs Court's power under the All Writs Act. In any event, it is well established that to give any weight to the nonaction of Congress is an unwarranted "venture into speculative

unrealities." *Helvering* v. *Hallock*, 309 U.S. 106, 120 (1940). *See also, FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), and *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942).*

The foregoing plainly demonstrates that the decision below is in direct conflict with the precedents of this Court, and others. If allowed to stand, the decision below will cast doubt upon the power of the federal judiciary to act promptly in aid of potential jurisdiction to protect against irreparable injury resulting from fundamental constitutional and statutory deficiencies in administrative proceedings. This fact alone is significant enough to justify the granting of the writ.

Equally important, however, is the fact that the decision below effectively insulates the conduct of the Treasury Department and Tariff Commission under the Antidumping Act from any meaningful judicial review, and leaves petitioners and others subject to dumping proceedings without a remedy against continuing irreparable injury resulting from allegedly unconstitutional and unlawful governmental conduct. The need for this Court's prompt clarification of available remedies is even more pressing as antidumping proceedings have rapidly grown in number and significance as a tool to regulate large amounts of international trade.

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* Other bases for the decision below are equally fallacious. For example, the contention that the Customs Court has no "equitable powers" is inapposite and begs the question presented here. Obviously, if the All Writs Act applies to Customs Court, as both the government and courts below apparently concede, then the Customs Court has the power to issue appropriate writs, whether this is technically considered an "equitable" power or not. None of the cases dealing with the equitable powers of the Customs Court involved an issue of the Court's power under the All Writs Act. *See Cummons-Collins Distilleries* v. *United States*, 20 Cust. Ct. 93, C.D. 1090 (1948), *aff'd*, 36 CCPA 88, C.A.D. 403 (1949); *Eurasia Import Co., Inc.* v. *United States*, 31 CCPA 202, C.A.D. 273 (1944).

Without question, the uncertainties and sensitivities normally involved in international commerce have been seriously increased and aggravated by the respondents' conduct in this and other recent dumping proceedings. The parameters of proper conduct by respondents in such proceedings likewise need to be clarified.

Ordinarily, petitioners would have sought the relief they have requested from a U.S. district court, the court which generally acts to protect aggrieved persons against arbitrary and capricious administrative action. In the instant situation, however, at least one Circuit has ruled that the appropriate place to seek such relief is *the Customs Court,* since "Congress intended the Customs Court to have exclusive original jurisdiction of constitutional questions arising out of customs litigation." *J. C. Penney Co., Inc.* v. *United States Treasury Department, et al.,* 439 F.2d 63, 67 (2d Cir. 1971), *cert. denied,* 404 U.S. 869 (1971). If the decision below is not overturned, petitioners have no place to go to seek the immediate relief necessary under the circumstances of this case.

The impact of the dumping finding on petitioners has been direct and immediate. Petitioners are subject to possible dumping duties on all television imports from Japan since September 4, 1970. Whether or not the dumping proceeding was lawfully and constitutionally conducted, or the dumping finding is valid, petitioners have had to revise their prices in the United States and/or Japan to avoid even the possibility of ultimate dumping duties, and to placate irate consumers misled by adverse publicity arising from this case. The dumping finding has likewise affected adversely petitioners' pricing flexibility as well as their commercial

relationships with certain of their customers. And petitioners and others involved in the television dumping case have been subjected to a treble damage action seeking $360 million for alleged violations of the antitrust laws and the Revenue Act of 1916 (the 1916 Antidumping Act) which in part relies upon the dumping finding issued by the Treasury Department in this case.

Thus, even if no dumping duties are ever assessed against petitioners, the impact of the unlawful dumping finding has had the same "direct and immediate" impact on petitioners as would the assessment of special dumping duties, and is properly subject to review *now*. *See, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). The issues before the Customs Court, should it exercise its jurisdiction under the All Writs Act, would be questions of law which can be decided *now* rather than at some indeterminate time in the future. As one court observed in a suit to declare unlawful and enjoin threatened administrative proceedings, it is "ridiculous to say that a matter of this importance, which can be decided now just as well as it can at the end of a long proceeding, should await the end of the proceeding. . . ." *Eisler* v. *Clark*, 77 F.Supp. 610, 611 (D.D.C. 1948), *cert. denied*, 338 U.S. 879 (1949).*

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* Because the Court below concluded that the Customs Court had no power to exercise its discretion to review the conduct complained of herein, the question of the circumstances in which the exercise of that jurisdiction is appropriate was not reached. If it had been, it is clear that the precedents of this Court would have compelled the exercise of that power in this case.

Thus, a writ under the All Writs Act will generally be issued in order to protect against the deprivation of a fundamental constitutional right such as is complained of here. *See, e.g., Ex parte Simons*, 247 U.S. 231 (1918); *Ex parte Peterson*, 253 U.S. 300 (1920). Similarly, a writ under the Act will generally be issued to

Conclusion

This petition presents an important question of first impression concerning the power of the Customs Court under the All Writs Act to intervene in an administrative proceeding under the Antidumping Act of 1921 to promptly protect petitioners, and others similarly situated, from immediate irreparable injury arising out of unlawful and unconstitutional administrative action. The decision below is contrary to established legal precedent concerning federal judicial power, including the decisions of this Court, and effectively precludes any meaningful judicial control over unlawful and unconstitutional administrative action under the Antidumping Act. The Act, and proceedings thereunder, is rapidly growing in significance as a regulator of rising amounts of international trade between

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check conduct, such as that involved here, which would "thwart the asserted purpose of Congress". *U.S. Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945). *See also LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U.S. 701 (1927). Also, a writ under the All Writs Act is justified when the issue presented is, as here, important and unique. *See, e.g., Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). *See also, Atlass* v. *Miner*, 265 F.2d 312 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960); *Pacific Car & Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1969). Finally, cases are legion in which district courts have intervened at an intermediate stage to enjoin administrative proceedings where fundamental procedural improprieties causing irreparable injury were alleged, despite the availability of judicial review at the end of the administrative proceedings. *See, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167 (1967); *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970); *Amos Treat & Co., Inc.* v. *SEC*, 306 F.2d 260 (D.C. Cir. 1962); *Silver King Mines, Inc.* v. *Cohen*, 261 F. Supp. 666 (D. Utah 1966).

the United States and foreign nations. For the reasons set forth above, the writ of certiorari requested by this petition should be granted.

Respectfully submitted,

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May 1973

APPENDICES

APPENDIX A

Opinion of the United States Court of Customs and Patent Appeals

Antidumping Act—All Writs Act—Summons and civil action dismissed for lack of jurisdiction

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MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA ELECTRIC COMPANY OF AMERICA,

Appellants,

—v.—

THE UNITED STATES TREASURY DEPARTMENT, *et al.*,

Appellees.

No. 5496, C.A.D. 1086

United States Court of Customs and Patent Appeals, February 1, 1973. Appeal from United States Customs Court, C.D. 4292 [Affirmed] 60 CCPA.

IRA M. MILLSTEIN,
A. PAUL VICTOR,
MARSHALL C. BERGER,

(WEIL, GOTSHAL & MANGES),
Attorneys of record, for appellants.

Opinion of the United States Court of Customs and Patent Appeals

E. Grey Lewis,
Acting Assistant Attorney General,

Andrew P. Vance,
Chief, Customs Section,

Frederick L. Ikenson
for the United States

[Oral argument October 4, 1972 by Mr. Victor and Mr. Vance]

Before Markey, *Chief Judge,* Rich, Almond, Baldwin, and Lane, *Associate Judges.*

Per Curiam.

Opinion of the United States Court of Customs and Patent Appeals

UNITED STATES COURT OF
CUSTOMS AND PATENT APPEALS

OCTOBER TERM 1972.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA ELECTRIC COMPANY OF AMERICA,

Appellants,

—v.—

THE UNITED STATES TREASURY DEPARTMENT, *et al.*,

Appellees.

Customs Appeal No. 5496.

February 1, 1973

PER CURIAM.

This appeal is from the order and accompanying memorandum of the United States Customs Court, *Matsushita Electric Industrial Co., Ltd.* v. *The United States Treasury Department,* 67 Cust. Ct. 328, C.D. 4292 (1971), granting appellees' motion to quash and dismiss a summons and civil action on the ground that the jurisdiction of the Customs Court had not been properly invoked. The civil action was commenced by a "Petition for Mandatory, Injunctive and Other Relief," filed in the Customs Court requesting an order of that court vacating all determinations and findings in the antidumping proceeding entitled Television Receiving Sets, Monochrome and Color, From Japan (ATS 643.3; AA1921-66), dismissing the proceeding, enjoining

appellees from taking any further action in connection therewith, and declaring the invalidity and unconstitutional nature of the proceeding, vacating the dumping determination, and requiring appellees to conduct the proceeding in a manner requested. The proceedings conducted by the Bureau of Customs and the Tariff Commission culminated in a finding by the Secretary of the Treasury that the television sets are being, or are likely to be, sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921, as amended, thus making the sets subject to dumping duties. However, no such dumping duties have been levied, and accordingly no protest has been filed or denied. The claim for jurisdiction of the Customs Court was made under the All Writs Act, 28 USC 1651.

We have considered the order and accompanying memorandum of the Customs Court and find ourselves in agreement therewith.

The order of the Customs Court is *affirmed.*

Affirmed.

BALDWIN, *Judge,* concurring.

The relief sought by appellants is summarized in their brief as follows:

> [Appellants'] petition sought: (a) an order vacating all determinations and findings in the aforementioned antidumping proceeding, dismissing the proceeding and enjoining defendants from taking any further action in connection therewith, and declaring the invalidity and unconstitutional nature of the proceeding; or (b)

> an order declaring the invalidity and unconstitutional nature of the proceeding and vacating the dumping determination, and requiring appellees to conduct the proceeding in the manner required by law and the Constitution * * * .

Appellants are in effect asking the Customs Court to exercise jurisdiction in the nature of mandamus, similar to the jurisdiction granted the United States District Courts by the Mandamus Act of 1962, 28 USC 1361. A proposal was made during the pendency of the Customs Court Act of 1970 that such jurisdiction should be conferred on the Customs Court, but the proposed provision was never enacted. See *Hearings on S.2624 before Subcomm. No. 3 of the House Comm. on the Judiciary,* 91st Cong., 2d Sess., ser. 13, at 254-55 (1970); *Hearings on S.2624 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. at 205 (1969).

The Customs Court was clearly correct in holding that the relief sought here is not within the powers granted it under the All Writs Act. I agree with the majority opinion and join in its endorsement of the Customs Court's well-reasoned memorandum.

APPENDIX B

Opinion of the United States Customs Court

UNITED STATES CUSTOMS COURT

MATSUSHITA ELECTRIC INDUSTRIAL COMPANY, LTD., *et al.*,
Plaintiffs,

—v.—

THE UNITED STATES TREASURY DEPARTMENT, *et al.*,
Defendants.

71-07-00467

ORDER

The defendants having moved this court for an order to quash the summons and civil action herein for lack of jurisdiction and having also moved this court for an order to strike the certificates of service of the petition or complaint and the affidavits of service of the summons and petition on the ground that service had not been effectuated in conformity with Rules 4.3(a), 4.1 and 3.2(e) of the Rules of this Court; and the plaintiffs having responded to said motions; and the defendants having replied to said response, and the plaintiffs having filed a surreply thereto,

Now, therefore, upon all the records, files and papers herein, and for the reasons stated in the accompanying memorandum, it is

ORDERED that defendants' motion to quash and dismiss the summons and civil action be, and the same hereby is,

granted, and said summons and civil action are hereby dismissed, and it is further

ORDERED that defendants' motion to strike the certificates and affidavits of service heretofore mentioned by, and the same hereby is, denied.

Dated: New York, N. Y.
Nov. 3, 1971

Memorandum to Accompany Order, dated November 3, 1971

(C.D. 4292)

MATSUSHITA ELECTRIC INDUSTRIAL COMPANY, LTD., *et al.*

—v.—

THE UNITED STATES TREASURY DEPARTMENT, *et al.*

Memorandum to accompany order

Port of New York, Court No. 71-07-00467

[Motion to quash and dismiss granted; motion to strike certificates denied; action dismissed.]

Dated November 3, 1971

RAO, *Judge*: On July 1, 1971, plaintiffs filed with this court a "Summons" stating that a "civil action, seeking mandatory, injunctive and declaratory relief, has been filed

in the Customs Court to contest acts of the defendants, taken under the Antidumping Act of 1921, as amended (19 U. S. C. § 160 *et seq.*), in the case entitled Television Receiving Sets, Monochrome and Color, From Japan (ATS 643.3; AA 1921-66)."

In a "Petition for Mandatory, Injunctive and Other Relief," filed on the same day, plaintiffs request this court to enter an order vacating all determinations and findings in the television antidumping proceeding, dismissing the proceeding, enjoining defendants from taking any further action in connection therewith, and declaring the invalidity and unconstitutional nature of the proceeding; or, to enter an order declaring the invalidity and unconstitutional nature of the proceeding and vacating the dumping determination and requiring defendants to conduct the proceeding in the manner requested.

Presently before the court are two separate motions made by defendants pursuant to the provisions of Rules 4.7(b) and 4.12 of the Rules of the United States Customs Court.

The first motion is to quash and dismiss the summons and the civil action on the ground that the jurisdiction of this court has not been properly invoked.

The second motion is to strike the certificates of service of the "Petition" or complaint and the affidavit of service of the summons and petition on the ground that service had not been effectuated in conformity with Rules 4.3(a), 4.1 and 3.2(e) of the Rules of the Court.

This case involves antidumping proceedings conducted by the Bureau of Customs and the Tariff Commission which culminated in a finding by the Secretary of the Treasury that television receiving sets, monochrome and color, from

Japan are being, or are likely to be, sold at less than fair value within the meaning of section 210(a) of the Antidumping Act of 1921, as amended, 5 Cust. Bull.—. T.D. 71-76 (1971). Accordingly, they are subject to dumping duties under the Antidumping Act. However, no such duties have as yet been levied. The gravamen of plaintiffs' complaint is that in the course of the proceedings, defendants have exceeded their statutory authority, have deprived plaintiffs of their right to a fair and impartial administrative adjudication and have denied them minimum procedural rights guaranteed by the due process clause of the Constitution and the Administrative Procedure Act. It is alleged that plaintiffs have suffered irreparable injury and have no adequate remedy except the specific judicial relief sought in this action.

Plaintiffs concede that the summons does not comply with formal requirements of a summons in a protest proceeding, as provided in Rule 3.4 of the Rules of this Court, and that their pleadings cannot and are not intended to comply with the Rules of the Court. It is their claim, rather, that the jurisdiction of this court may be invoked under the All Writs Act, 28 U. S. C. § 1651, which provides:

> § 1651. Writs.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Thus, leaving technical considerations aside, the court is presented with the novel issue as to whether it may under

the All Writs Act grant injunctive and declaratory relief in a case where no duties have been assessed and no protest filed or denied.

This is a court of limited statutory jurisdiction which has no equity powers. *Cummins-Collins Distilleries* v. *United States,* 20 Cust. Ct. 93, 97, C. D. 1090 (1948), aff'd 36 CCPA 88, C. A. D. 403 (1949); *Eurasia Import Co., Inc.* v. *United States,* 31 CCPA 202, C. A. D. 273 (1944). In *Match Import Co., Inc.* v. *United States,* 4 Cust. Ct. 694, Reap. Dec. 4762 (1940), it was pointed out (p. 696):

> The United States Customs Court is a statutory court of special and limited jurisdiction. It is the court exercising original jurisdiction in tariff matters to the exclusion of all other courts. It is the tribunal established by Congress providing a complete system of corrective justice for the administration of customs laws. (*David L. Moss Co., Inc.* v. *United States,* 103 Fed. 2nd, 395.) Although its jurisdiction covers a wide scope, to include almost every legal controversy arising between an importer and the Government with respect to the rate assessable upon and the dutiable value of imported merchandise, nevertheless such jurisdiction is necessarily subject to the restrictions imposed by the various provisions of the Tariff Act of 1930.

Declaratory judgment and injunctive remedies are equitable in nature (*Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 155 (1967) and have not been considered within the purview of this court. *Eurasia Import Co., Inc.* v. *United States, supra.*

The Customs Courts Act of 1970 (84 Stat. 274) has set forth the jurisdiction of the Customs Court as follows:

§ 1582. Jurisdiction of the Customs Court

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended,

or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

As to antidumping proceedings, it is stated in 19 U. S. C. § 169, as amended:

§ 169. Protests from determinations of customs officers

For the purposes of sections 160 to 171 of this title, the determination of the appropriate customs officer as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of such customs officer in assessing special dumping duty, shall have the same force and effect and be subject to the same right of protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of protests relating to customs duties under existing law.

Under predecessor statutes, where questions involving the assessment of duties under the Antidumping Act have been brought before this court by way of an appeal for reappraisement or by protest, it has accepted jurisdiction.

United States v. *Elof Hansson, Inc.*, 48 CCPA 91, C.A.D. 771 (1960), cert. den. 368 U.S. 899 (1961); *Ellis K. Orlowitz Co.* v. *United States*, 50 CCPA 36, C.A.D. 816 (1963); *United States* v. *William Prym of America (Inc.)*, 17 CCPA 180, T.D. 43475 (1929); *James S. Kean* v. *United States*, 20 CC PA 388, T.D. 46186 (1933). In such cases it may review the actions of the Secretary of the Treasury and the Tariff Commission to determine whether the procedures prescribed by Congress have been followed and whether the Secretary, the Tariff Commission, or their delegates have proceeded within the statutory authority or whether their actions are *ultra vires* and void. *Kleberg & Co. (Inc.)* v. *United States*, 21 CCPA 110, T.D. 46446, 71 F. 2d 332 (1933); *United States* v. *Elof Hansson, Inc. supra; City Lumber Co. et al.* v. *United States*, 64 Cust. Ct. 826, A.R.D. 269, 311 F. Supp. 340 (1970) (appeal pending).

The case here, however, is outside the framework of the general statutory scheme for customs litigation and the question is whether this court has any authority to entertain it.

In actions brought in the district courts for equitable relief, it has been consistently held that the importer has an adequate remedy at law in the Customs Courts and that equitable relief is barred. *Kreutz et al.* v. *Durning*, 69 F. 2d 802 (1934); *Cottman Co. et al.* v. *Dailey*, 94 F. 2d 85 (1938); *Horton* v. *Humphrey*, 146 F. Supp. 819 (1956), aff'd 352 U.S. 921 (1956); *J. C. Penney Company Inc.* v. *United States Department of the Treasury*, 319 F. Supp. 1023 (1970), aff'd 439 F. 2d 63 (1971), cert. den. —— U.S. —— (1971).

In the *Cottman* case, the court said (pp. 88, 89):

* * * Congress has provided a complete system of corrective justice with respect to matters arising under the customs laws. * * * The mere fact that the act of Congress is alleged to be unconstitutional or the imposition of the duty beyond the statutory power of the Secretary of the Treasury or his assistants does not present a case for equitable interference where such legal remedy is provided. * * *

In *Horton* v. *Humphrey, supra*, the court said (p. 821):

We recognize, of course, that neither the Customs Court nor the Court of Customs and Patent Appeals appears to have the equity powers of a district court. * * * Thus in import duty matters, if the jurisdiction of the Customs Court and the Court of Customs and Patent Appeals is exclusive, there may be no way to obtain the equitable relief in situations of extreme hardship which the Supreme Court has occasionally permitted in internal revenue cases despite the statute flatly prohibiting injunctions in tax matters. * * * Since the threat of imposition of the dumping duty is alleged by the complaint to have forced plaintiffs out of the business of importing the type of pipe involved, the case might—as an original proposition—fall within the exceptions the Supreme Court has carved in this statute, even though (as we have noted) plaintiffs would not have to pay the additional duty until they had exhausted their remedy in the Customs Court and in the Court of Customs and Patent Appeals. But we think it is too clearly established that those courts

provide an adequate and exclusive remedy in this sort of case for us to make an exception here.

As pointed out in *Kreutz et al.* v. *Durning, supra,* an importer brings his goods into the United States at his peril and takes his chances on a finding of dumping being made.

Since district courts have declined jurisdiction in cases similar to this one, plaintiffs here are seeking to obtain injunctive and declaratory relief in this court on the authority of the All Writs Act.

The purpose of the All Writs Act is to assure to the various federal courts the power to issue appropriate writs and orders of an auxiliary nature in aid of their respective jurisdictions as conferred by other provisions of law. *In re Previn et al.*, 204 F. 2d 417 (1953). It presupposes existing complete jurisdiction and does not contain a new grant of judicial power. *United States* v. *First Federal Savings & Loan Ass'n*, 248 F. 2d 804 (1957); *Benson* v. *State Board of Parole & Probation et al.*, 384 F. 2d 238 (1967); *Longview Tugboat Company* v. *Jameson*, 218 F. 2d 547 (1955); *Stafford* v. *Superior Court of California, etc.*, 272 F. 2d 407 (1959).

Plaintiffs claim, nevertheless, that since this court could, at a later stage, be called upon to review the dumping determination, after dumping duties have been assessed, a protest denied and a civil action brought under 28 U.S.C. § 1582. The All Writs Act may be invoked in aid of its prospective jurisdiction. Plaintiffs rely on *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), and cases cited. There it was pointed out that jurisdiction under the All Writs Act extends to cases which are potentially within the appellate

jurisdiction of a court although no appeal has been perfected. From this plaintiffs reason that the power has been conferred upon the Customs Court on the ground that this court may be called upon to review the administrative actions of the Treasury Department and the Bureau of Customs. However, this is not appellate jurisdiction nor does the court have supervisory powers over customs or treasury officials. *Borneo Sumatra Trading Co., Inc.* v. *United States,* 56 Cust. Ct. 166, 175, C.D. 2624 (1966), aff'd on rehearing 64 Cust. Ct. 185, C.D. 3980, 311 F. Supp. 326 (1970). There is a wide difference, moreover, in an appellate court's exercise of power under the All Writs Act where a lower court already has jurisdiction of the subject matter of the action and an appeal in the particular case is likely, and the situation here where dumping duties may, or may not, be assessed, and where if assessed, some one, not necessarily the present plaintiffs, may protest the assessment and bring an action in this court.

Plaintiffs' claim that granting the relief requested in their petition would aid the jurisdiction of the court, is untenable. This court will have complete jurisdiction over the administrative decision assessing dumping duties, including the legality of all orders and findings entering into the same whenever a case is properly brought before it under 28 U.S.C. §§ 1582 and 2632. It is not now in need of any aid nor does it appear how vacating the proceedings or enjoining the assessment of duties could aid its jurisdiction.

In a recent case, *Equal Employment Opportunity Commission* v. *Woolco Department Store,* 321 F. Supp. 811 (1971), plaintiff brought suit seeking injunctive and other relief against the defendant for alleged unfair employ-

ment practices. Defendant moved to dismiss the action for lack of jurisdiction and on the ground that plaintiff did not have standing to sue.

The complaint asserted that jurisdiction was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and the All Writs Act, 28 U.S.C. § 1651(a). Title VII provides that the district court shall have jurisdiction over actions brought by persons claiming to be aggrieved by the alleged unlawful employment practice and who have complied with the prescribed procedures, and actions brought by the Attorney General against persons engaging in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII. The action in the case cited was not brought by an aggrieved party nor the Attorney General, but plaintiff [EEOC] contended that its authority derived from the inherent right and power which a government agency has to protect itself and its jurisdiction and that under the All Writs Act, the court has jurisdiction to issue such orders as might be necessary to protect its own jurisdiction. The court held that the only proceedings which the Commission was authorized to bring were those specifically set out in Title VII and that the All Writs Act did not operate to confer jurisdiction where none otherwise existed because said act may be invoked by the court only in aid of jurisdiction which it already has.

The jurisdiction of the Customs Court has always been limited and the recent legislation has clearly delineated it. Actions may be instituted by any person whose protest has been denied by the appropriate customs officer or in certain cases by American manufacturers, producers, or whole-

salers, 28 U.S.C. § 1582(a) and (b). Plaintiffs here do not fit into any of these categories. It is further stated that the Customs Court shall not have jurisdiction of any action unless (1) a protest has been filed and denied or the remedies open to American manufacturers have been exhausted and (2) the liquidated duties, charges or exactions have been paid, 28 U.S.C. § 1582 (c). These conditions have not been met here. Certainly, the general language of the All Writs Act cannot be construed to confer jurisdiction where Congress has not only not provided for it but has in effect denied it. The purpose of the recently enacted Customs Court Act of 1970 was to improve and modernize the judicial machinery in the customs courts. Had Congress intended to confer equitable jurisdiction on them or authority to entertain a petition such as this one, it would have done so. The All Writs Act may not be read so as to grant to this court a whole new line of jurisdiction which legislation specifically relating to it has prohibited.

The arguments and authorities presented by the plaintiffs in the instant case are not persuasive that this court should do, by judicial fiat, what Congress has clearly not provided for by legislative mandate. Therefore, defendants' motion to quash and dismiss the summons and civil action for lack of jurisdiction is granted.

In view of the dismissal of the action for lack of jurisdiction of the subject matter, the questions raised in defendants' second motion, to strike the certificate of service of the petition and the affidavit of service of the summons and petition on the ground that service had not been effectuated

in conformity with the Rules of this Court, are moot. That motion is denied.

PAUL P. RAO
Judge

Dated: New York, N. Y.
Nov. 3, 1971

Indorsed: United States Court of Customs and Patent Appeals. Filed January 17, 1972. George E. Hutchinson, Clerk.

APPENDIX C

Constitutional Provision

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Statutory Provisions

19 U.S.C. § 160 *et seq.* Antidumping Act of 1921

DUMPING INVESTIGATION

§ 160. *Initiation of investigation; injury determination; findings; withholding appraisement; publication in Federal Register*

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160-173 of this title called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative. May 27, 1921, c. 14, § 201, 42 Stat. 11; Sept. 1, 1954, c. 1213, Title III, § 301, 68 Stat. 1138; Aug. 14, 1958, Pub.L. 85-630, §§ 1, 4(b), 72 Stat. 583, 585.

Statutory Provisions

SPECIAL DUMPING DUTY

§ 161. *Amount of duty to be collected; determination of foreign market value of goods*

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United

States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a(3) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(c) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the fact that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary

course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a(3) of this title is used in determining foreign market value,

then due allowance shall be made therefor. May 27, 1921, c. 14, § 202, 42 Stat. 11; Sept. 1, 1954, c. 1213, Title III, § 302, 68 Stat. 1139; Aug. 14, 1958, Pub.L. 85—630, §§ 2, 4(b), 72 Stat. 583, 585; June 2, 1970, Pub.L. 91—271, Title III, § 311, 84 Stat. 292.

PURCHASE PRICE

§ 162. *Purchase price*

For the purposes of this section and sections 160-171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in

the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacturer, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States. May 27, 1921, c. 14, § 203, 42 Stat. 12.

§ 163. *Determination of exporter's sales price*

For the purpose of sections 160-171 of this title, the exporter's sales price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of

the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States. May 27, 1921, c. 14, § 204, 42 Stat. 13.

FOREIGN MARKET VALUE

§ 164. *Determination of foreign market value*

For the purposes of sections 160-171 of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secre-

tary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of sections 160-171 of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 166 of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value. May 27, 1921, c. 14, § 205, 42 Stat. 13; Aug. 14, 1958, Pub.L. 85—630, § 3, 72 Stat. 584.

Statutory Provisions

§ 165. *Constructed value—Determination*

(a) For the purposes of sections 160-171 of this title, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that (A) the amount for general expenses shall not be less than 10 per centum of the cost as defined in paragraph (1), and (B) the amount for profit shall not be less than 8 per centum of the sum of such general expenses and cost; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

Statutory Provisions

TRANSACTIONS DISREGARDED; BEST EVIDENCE

(b) For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c) of this section.

PERSONS INVOLVED IN DISREGARDED TRANSACTIONS

(c) The persons referred to in subsection (b) of this section are:

(1) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;

(2) Any officer or director of an organization and such organization;

(3) Partners;

(4) Employer and employee;

(5) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting stock or shares of any organization and such organization; and

(6) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

May 27, 1921, c. 14, § 206, 42 Stat. 213; Aug. 14, 1958, Pub.L. 85—630, § 4(a), 72 Stat. 584.

EXPORTER

§ 166. *Exporter defined*

For the purposes of sections 160-171 of this title, the exporter of imported merchandise shall be the person by whom or for whose account the merchandise is imported into the United States:

(1) If such person is the agent or principal of the exporter, manufacturer, or producer; or

(2) If such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer; or

(3) If the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person; or

(4) If any person or persons, jointly or severally, directly or indirectly, through stock ownership or control

or otherwise, own or control in the aggregate 20 per centum or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States and also 20 per centum or more of such power or control in the business of the exporter, manufacturer, or producer. May 27, 1921, c. 14, § 207, 42 Stat. 14.

OATHS AND BONDS ON ENTRY

§ 167. *Oath and bond of person for whose account merchandise is imported before delivery thereof*

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and delivery of which has not been made by the appropriate customs officer before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before such customs officer, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for such customs officer to deliver the merchandise until such person has made oath before such customs officer, under regulations prescribed by the said Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to such customs officer, under regulations prescribed by the Secretary, with sureties approved by such customs officer, in an amount equal to

the estimated value of the merchandise, conditioned: (1) That he will report to such customs officer the exporter's sales price of the merchandise within thirty days after such merchandise has been sold or agreed to be sold in the United States; (2) that he will pay on demand from such customs officer the amount of special dumping duty, if any, imposed by sections 160 to 171 of this title, upon such merchandise; and (3) that he will furnish to such customs officer such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe. May 27, 1921, c. 14, § 208, 42 Stat. 14; June 2, 1970, Pub.L. 91-271, Title III, § 312, 84 Stat. 292.

DUTIES OF APPRAISERS

§ 168. *Appraisal*

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and as to which the appropriate customs officer has made no appraisement before such finding has been so made public, it shall be the duty of such customs officer, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of sections

160 to 171 of this title. May 27, 1921, c. 14, § 209, 42 Stat. 15; Aug. 14, 1958, Pub.L. 85-630, § 4(b), 72 Stat. 585; June 2, 1970, Pub.L. 91-271, Title III, § 313, 84 Stat. 292.

APPEALS AND PROTESTS

§ 169. *Protests from determinations of customs officers*

For the purposes of sections 160 to 171 of this title, the determination of the appropriate customs officer as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of such customs officer in assessing special dumping duty, shall have the same force and effect and be subject to the same right of protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of protests relating to customs duties under existing law. May 27, 1921, c. 14, § 210, 42 Stat. 15; May 28, 1926, c. 411, § 1, 44 Stat. 669; March 2, 1929, c. 488, § 1, 45 Stat. 1475; Aug. 14, 1958, Pub.L. 85-630, § 4(b), 72 Stat. 585; June 2, 1970, Pub.L. 91-271, Title III, § 314, 84 Stat. 293.

§ 170. *Special duties treated as regular duties*

The special dumping duty imposed by sections 160-171 of this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties. May 27, 1921, c. 14, § 211, 42 Stat. 15.

Statutory Provisions

§ 170a. *Definitions*

For the purposes of sections 160-171 of this title—

(1) The term "sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise under consideration, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise under consideration.

(3) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of sections 160-171 of this title can be satisfactorily made:

(A) The merchandise under consideration and other merchandise which is identical in physical

characteristics with, and was produced in the same country by the same person as, the merchandise under consideration.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise under consideration.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used and (iii) approximately equal in commercial value to the merchandise under consideration.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

(E) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determines may reasonably be compared for the purposes of sections 160-171 of this title with the merchandise under consideration.

(F) Merchandise which satisfies all the requirements of subdivision (E) except that it was produced by another person.

(4) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

May 27, 1921, c. 14, § 212, as added Aug. 14, 1958, Pub.L. 85—630, § 5, 72 Stat. 585.

SHORT TITLE

§ 171. *Citation*

Sections 160-171 of this title may be cited as the "Antidumping Act, 1921." May 27, 1921, c. 14, § 213, formerly § 212, 42 Stat. 15, renumbered Aug. 14, 1958, Pub.L. 85-630, § 5, 72 Stat. 585.

§ 172. *Additional definitions*

When used in sections 160-171 of this title—

The term "person" includes individuals, partnerships, corporations, and associations; and

The term "United States" includes all Territories and possessions subject to the jurisdiction of the United States, except the Virgin Islands, the islands of Guam and Tutuila, and the Canal Zone. May 27, 1921, c. 14, § 406, 42 Stat. 18; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

Statutory Provisions

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

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5 U.S.C. § 551 *et seq.* Administrative Procedure Act

§ 551. *Definitions*

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 381.

§ 552. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and

in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90—23, § 1, June 5, 1967, 81 Stat. 54.

§ 553. *Rule making*

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons

therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 383.

§ 554. *Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute

to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency

review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89—554, Sept. 6, 1966. 80 Stat. 384.

§ 555. *Ancillary matters*

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or

in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or

when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 385.

§ 556. *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision*

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or docu-

mentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 386.

§ 557. *Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record*

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be

certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 387.

§ 558. *Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses*

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases

of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 388.

§ 559. *Effect on other laws; effect of subsequent statute*

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2) (E), 5362, and 7521, and the provisions of section 5335(a) (B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2) (E), 5362,

or 7521, or the provisions of section 5335(a) (B) of this title that relate to hearing examiners, except to the extent that it does so expressly. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 388.

§ 701. *Application; definitions*

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 392.

§ 702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 392.

§ 703. *Form and venue of proceeding*

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 392.

Statutory Provisions

§ 704. *Actions reviewable*

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 392.

§ 705. *Relief pending review*

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 393.

Statutory Provisions

§ 706. *Scope of review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a

party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89—554, Sept. 6, 1966, 80 Stat. 393.

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28 U.S.C. § 1582. Jurisdiction of the Customs Court

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action

relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues may be included in a single civil action. Actions may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues. June 25, 1948, c. 646, 62 Stat. 943; June 2, 1970, Pub.L. 91-271, Title I, § 110, 84 Stat. 278.

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19 U.S.C. § 1514. Protest against decision of appropriate customs officer—Finality of decisions; return of papers

(a) Except as provided in section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;

(5) the liquidation or reliquidation of an entry, or any modification thereof;

(6) the refusal to pay a claim for drawback; and

(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court in accordance with section 2632 of Title 28 within the time prescribed by section 2631 of that title. When a judgment or order of the United States Customs Court has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

FORM, NUMBER, AND AMENDMENT OF PROTEST; FILING OF PROTEST

(b) (1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer designated in regulations prescribed by the Secretary, setting forth distinctly and specifically each

decision described in subsection (a) of this section as to which protest is made; each category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor. Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest. A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section. Except as otherwise provided in section 1557(b) of this title, protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction, or filing any claim for drawback, or seeking entry or delivery, with respect to merchandise which is the subject of a decision in subsection (a) of this section.

(2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

LIMITATION ON PROTEST OF RELIQUIDATION

(c) The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the customs officer upon any question not involved in such reliquidation. June 17, 1930, c. 497, Title IV, § 514, 46 Stat. 734; June 2, 1970, Pub.L. 91-271, Title II, § 207, 84 Stat. 284.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1479

MATSUSHITA ELECTRIC INDUSTRIAL COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES TREASURY DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners are a Japanese corporation which manufactures television sets for sale in Japan and for export to the United States, and a United States corporation which imports and sells such television sets in the United States.

In 1968, the Treasury Department instituted an industry-wide proceeding to investigate whether television sets imported from Japan are being, or are likely to be, sold at less than fair value ("LTFV") within the meaning of the Antidumping Act (33 Fed. Reg. 8851). In December 1970, the Treasury Department determined that they were being so sold. It so advised the United States Tariff Commission (19 C.F.R. 153.38), which after notice and hearing determined that the

domestic industry is being, or is likely to be, injured by reason of such importation (Pet. 4-5; 36 Fed. Reg. 4576-4578). The Secretary of the Treasury made a "dumping" finding—that is, he found that television receiving sets, monochrome and color, from Japan are being, or are likely to be, sold at less than fair market value (Pet. 4-5; 19 C.F.R. 153.40; 36 Fed. Reg. 4597; 35 Fed. Reg. 18549; 19 C.F.R. 153.35). Accordingly, they are subject to duties known as "dumping" duties, under the Anti-dumping Act. However, no such duties have as yet been levied.

After making that finding, the Treasury Department investigated on an individual basis the foreign market value of particular makes and models of Japanese television receivers during specified time periods, in order to appraise the imported sets on an entry-by-entry basis (19 U.S.C. 161(a)). The foreign market value of the petitioning Japanese corporation's television sets was only recently determined, and an entry appraisement is now in process (Pet. 5).

2. In July 1971, shortly after the Treasury Department made its "dumping" finding, petitioners instituted this action in the Customs Court, seeking a mandatory injunction and declaratory relief invalidating and vacating the finding on the ground that the proceedings leading to it had denied petitioners due process. Customs Court jurisdiction was invoked under the All Writs Act, 28 U.S.C. 1651 (Pet. 6-7).

The Customs Court dismissed the petition, holding that the suit was premature, and that the court lacked equitable jurisdiction to issue the requested relief under the All Writs Act (Pet. App. 7a-19a). The Court of Customs and Patent Appeals affirmed, for the reasons given by the Customs Court (Pet. App. 3a-5a).

3. The decision of the Court of Customs and Patent Appeals is correct and no issue warranting further review is presented.

The petition in the Customs Court was premature. Under the statutory scheme, Customs Court jurisdiction attaches only after a protest against the decision of the appropriate Customs officer has been filed with and denied by the Secretary of the Treasury. 28 U.S.C. 1582. Here, no protest has been filed; in fact no dumping duty has been levied against petitioners. As the Customs Court noted (Pet. App. 16a):

> [T]he situation here * * * [is that] dumping duties may, or may not, be assessed, and where if assessed, someone, not necessarily the present plaintiffs, may protest the assessment and bring an action in this court.

The action is thus not ripe for review by the Customs Court, and was properly dismissed on that ground. *J. C. Penney Co.* v. *United States Treasury Dept.*, 439 F. 2d 63, 68 (C.A. 2), certiorari denied, 404 U.S. 869.

Furthermore, petitioners' suit was barred under Section 7421 of the Internal Revenue Code of 1954, 26 U.S.C. 7421, which prohibits suits to restrain the assessment or collection of any tax. This provision has been held to bar suits to enjoin the assessment of customs duties. *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C.A. 4); cf. *Horton* v. *Humphrey*, 146 F. Supp. 819, 821 (D. D.C.), affirmed, 352 U.S. 921. Petitioners cannot escape the bar of this statute on the ground that they are seeking declaratory relief, since the declaratory judgment statute does not apply to federal tax controversies. 28 U.S.C. 2201.

Finally, the Customs Court could not grant the relief requested. The petition sought to vacate the determina-

tions of the Treasury Department and of the United States Tariff Commission. The Customs Court, however, cannot grant equitable relief. *Eurasia Import Co., Inc.* v. *United States,* 31 CCPA 202, 211, C.A.D. 273; *Carl Matusek Shipping Co., Inc.* v. *United States,* 51 Cust. Ct. 8, C.D. 2406; *Cummins-Collins Distilleries* v. *United States,* 20 Cust. Ct. 93, C.D. 1090, affirmed, 36 CCPA 88, C.A.D. 403; *Julius C. Wolff, Inc.* v. *United States,* 58 Treas. Dec. 404, T.D. 44310. Petitioners' reliance in that court on the All Writs Act, 28 U.S.C. 1651, does not confer the necessary authority, since that Act is not an independent grant of jurisdiction. See, *e.g., Benson* v. *State Board of Parole & Probation,* 384 F. 2d 238, 239 (C.A. 9), certiorari denied, 391 U.S. 954; *Stafford* v. *Superior Court of California,* 272 F. 2d 407, 409 (C.A. 9), certiorari denied, 362 U.S. 979; *In re Previn,* 204 F. 2d 417, 418 (C.A. 1); 9 Moore, *Federal Practice,* para. 110.26, p. 282 (2d ed., 1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06